IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MICHAEL and LORI LENHART,

Plaintiffs,

vs.

AIR AMERICA, INC., et al.

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 2:03CV429DAK

This matter is before the court on Defendants Great-West Life & Annuity Insurance Co. and One Health Plan, Inc.'s ("Great-West Defendants") Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Plaintiffs Motion for Continuance of Defendants' Motion to Dismiss Pursuant to Rule 56(f). The court held a hearing on these motions on December 8, 2003. Plaintiffs were represented by Brian S. King, and Defendants were represented by Scott M. Petersen and David N. Kelley. The court took the motions under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to the parties' motions. Now being fully advised, the court enters the following Order.

28

BACKGROUND

Plaintiff Michael Lenhart was employed by Air America and a participant in Air America's Employee Welfare Benefits Plan ("the Plan"). Michael and Lori Lenhart had a child that was born prematurely on May 19, 2000 at Alta View Hospital. The baby was life-flighted to Primary Children's where he received care and treatment. Plaintiffs sought payment of medical expenses from the Plan but their claims were denied because the contracts had terminated for lack of funding and failure to pay the administrative service fees and premiums. Plaintiffs, individually and as guardians of their son, Joshua, have brought this case asserting causes of action against the Great-West Defendants for breach of fiduciary duty under ERISA, negligence, and breach of contract.

Great-West was a third-party administrator of the Plan. The Plan Administrator was Darrel L. Stephens, a principal of Air America, Inc. Under the Plan, there were two types of benefits: 1) Air-America's self-funded medical and prescription drug benefit; and 2) Great-West's life and accidental death and dismemberment insurance. The only benefits at issue in this case are those provided under the medical and drug portion of the Plan.

Under the Plan, Air America is "fully responsible for the self-funded benefits [medical and prescription drug]." Great-West processes claims and provides other services to Air America related to the self-funded benefits. However, Great West "does not insure or guarantee the self-funded benefits." Also, for self-funded benefits, the Plan Administrator "has the exclusive and full discretion and authority to determine the benefits and amounts payable and to construe and interpret all terms and provisions." Appeals for the self-funded benefits were to be directed to the Plan Administrator. Great-West, however, had full discretion and authority for

the insured benefits.

On May 1, 2000, Air America and Great-West entered into a Services Contract whereby Great-West agreed to be a third-party administrator of the Plan. Under Article 2 of the Services Contract, Great-West agreed "to perform such services involving the performance of non-discretionary duties as are specified in the SCHEDULE OF SERVICES marked SCHEDULE A." The services to be provided included such assistance as identification card preparation, preparation of enrollment procedures, assistance in plan enrollment, claim form preparation and printing, check preparation, benefit payments in accordance with the plan, physician payment reports, and actuarial cost estimates.

Under Article 5 of the Services Contract, Great-West was not to act in any fiduciary manner. Air America retained all authority to control and manage the operation of the self-funded portion of the Plan, including Plan interpretation. It was expressly agreed that Great West would not be designated as plan administrator or as a fiduciary of the Plan.

Also on May 1, 2000, Air America and Great-West entered into a Stop-Loss Contract. The Stop-Loss Contract provides a method by which Air America can be assured that in any one month the claims they must pay in their self-funded plan will not exceed a certain amount. Article 10 of the Stop-Loss Contract states that the contract "will not create rights or obligations whatsoever on the part of Great-West with respect to the persons covered under the Plan, or their beneficiaries." It is not known whether the Lenharts' extensive medical bills triggered the Stop-Loss provisions.

DISCUSSION

The Great-West Defendants have moved to dismiss the claims asserted against them in

Plaintiffs' Complaint. Plaintiffs claim that the documents attached to the Great-West Defendants' Motion to Dismiss converts the motion to dismiss to a motion for summary judgment and have moved for a continuance pursuant to Rule 56(f) of the Federal Rules of Procedure, claiming that discovery is necessary before the court rules on several of the issues raised in the Great West Defendants' Motion to Dismiss.

Great-West Defendants' Motion to Dismiss

The Great-West Defendants move for dismissal on several grounds: 1) Plaintiffs' claim for benefits under 29 U.S.C. § 1132(a)(1)(B) fails because the Great West Defendants are not the Plan or a fiduciary of the Plan as defined by ERISA; 2) Plaintiffs' claim for breach of fiduciary duties under 29 U.S.C. § 1109 and 1132(a) fails because the Great West Defendants are not fiduciaries, the actions complained of are not fiduciary actions, and this is not an appropriate claim for individual benefits; 3) Plaintiffs' claim for appropriate equitable relief under 29 U.S.C. § 1132(a)(3) fails because Plaintiffs have other appropriate relief under § 1132(a)(1)(B) of ERISA; 4) Plaintiffs' state law negligence claim fails because it is preempted by ERISA and the GREAT West Defendants owed no duty of care to Plaintiffs; and 5) Plaintiffs' breach of contract claim fails because it is preempted by ERISA, Plaintiffs are not parties to the contracts alleged to have been breached, Plaintiffs cannot claim benefits under an alleged oral contract, and the contract relied upon by Plaintiffs specifically states that the parties to the contract intend no benefit to any third-parties.

1) ERISA, 29 U.S.C. § 1132(a)(1)(B) Claim

Plaintiffs' first claim for relief is for wrongful denial of past medical benefits under 29 U.S.C. § 1132(a)(1)(B). Claims for unpaid benefits under § 1132(a)(1)(B) are appropriate only

against the Plan or a fiduciary of the Plan. *Moore v. Berg Enterprises,* Inc., 3 F. Supp. 2d 1245, 1248 (D. Utah 1998). The parties agree that the Great-West Defendants are not the Plan. The parties, however, dispute whether the Great-West Defendants are fiduciaries of the Plan pursuant to ERISA. ERISA defines a fiduciary as follows:

> A person is a fiduciary with respect to a plan to the extent (i) he exercised any discretionary authority or discretionary control respecting management of such plan or exercised any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.

29 U.S.C. § 1002(21)(A).

A person can be a fiduciary of a Plan even if he is not designated as one in Plan documents. "To determine whether a person is a fiduciary, the court must look at the functions performed by the individual, not the title that individual holds." *Houton v. Thompson*, 764 F. Supp. 20, 22 (D. Conn. 1991) (citing *Blatt v. Marchall & Lassman*, 812 F.2d 810, 812 (2d Cir. 1987)). "The performance of ministerial functions, including the preparation of reports required by government agencies, does not entail discretionary authority or responsibility within the meaning of 29 U.S.C. § 1002(21)(A)." *Anoka Orthopaedic Assocs. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990).

The Great-West Defendants argue that they are not fiduciaries under the self-funded portion of the Plan because the terms of the Plan specifically place the responsibility for eligibility determinations, payment of benefits, and interpretation of plan provisions on the Plan Administrator, not the Great-West Defendants. The Great West Defendants claim that they perform nothing more than ministerial actions and are subject to the discretionary decisions of Air America with respect to the self-funded portion of the Plan.

However, Plaintiffs argue that the Great-West Defendants acted as fiduciaries for at least some of the Plan assets. As a stop-loss insurer, it is likely that at least some portion of the medical expenses incurred by Joshua Lenhart would have, fallen under the Great-West Defendants' coverage requirements. To the extent the Great-West Defendants were, or would have been, responsible to pay any of Joshua Lenhart's medical bills as a result of the Stop-Loss Contract, it is unclear whether the Great-West Defendants or Air America would have had discretion as to the payment of benefits.

The determination of whether a party is a fiduciary under ERISA looks at the parties functions or activities. The Great-West Defendants contend that the language of the contracts cannot be changed without a written amendment. However, this argument ignores the purpose and intent in looking at a parties actual relationship to a plan, rather than the titles parties choose to employ, in order to determine whether a party is a fiduciary. "The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility to the plan's beneficiaries, require that a person with authority to direct payment of a plan's money be deemed a fiduciary." *IT Corp. v. General American Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997).

Because there is a question as to the Great-West Defendants role in directing payment once the Stop-Loss provisions are invoked, there is a factual question at this stage of the litigation as to whether the Great-West Defendants were functional fiduciaries of the Plan under ERISA. Plaintiffs are entitled to pursue discovery as to Great-West's practical control. Accordingly, the Great-West Defendants' motion to dismiss this claim is denied.

2) ERISA, 29 U.S.C. § 1109 and § 1132(a)(2) Claim

Plaintiffs also claim a breach of fiduciary duty under 29 U.S.C. § 1132(a)(2). Section 1132(a)(2) provides a cause of action to redress violations of ERISA fiduciary responsibility provisions. However, the cause of action provided by Congress is not intended to provide individual relief. Instead, it is designed to obtain relief on behalf of the benefit plan as a whole. *Walter v. International Ass'n of Mach. Pension Fund*, 949 F.2d 310, 317 (10th Cir. 1991). In *Walter*, the Tenth Circuit noted that "[u]nder section 1109, a fiduciary who breaches his fiduciary duty is liable to the plan–not to the beneficiaries individually." *Id.*

In this case, Plaintiffs' fiduciary breach claim is merely an alternative means of recovering individual benefits, which Plaintiffs can appropriately bring against the proper parties under § 1132(a)(1)(B). *See Mein v. Pool Company Disabled Int'l Employee Long Term Disability Benefit Plan*, 989 F. Supp. 1337, 1350-51 (D. Colo. 1998).

Plaintiff claims that it is bringing this cause of action under § 1009 and § 1132(a)(2) for losses to the Plan and that they seek recovery for losses incurred by the Plan as well as other relief that inures to the benefit of the Plan and all participants. However, at oral argument on this motion, Plaintiffs conceded that they do not know of any other party affected by the alleged breach. Plaintiffs only stated claim is for individual benefits. Therefore, the appropriate claim is under § 1132(a)(1)(B). Accordingly, the Great-West Defendants' Motion to Dismiss Plaintiffs' § 1132(a)(2) claim is granted.

3) ERISA, 29 U.S.C. § 1132(a)(3)

Plaintiffs further seek other equitable relief pursuant to 29 U.S.C. § 1132(a)(3). The Great-West Defendants argue that Plaintiffs' § 1132(a)(3) claim fails because there are clearly

monetary remedies to compensate Plaintiffs' fully under the other causes of action.

In *Varity Corp. v. Howe*, 516 U.S. 489, 508 (1996), the Supreme Court held that beneficiaries seeking relief under a welfare benefit plan could only maintain a fiduciary breach claim for equitable relief when the plan participants or beneficiaries are provided with no other adequate ERISA remedy. "[W]e should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id.* at 515.

The only fact alleged in the Complaint to be wrongful after the Plan was established is the failure to pay the Plaintiffs' medical claim. Failure to pay benefits is adequately remedied against the Plan through § 1132(a)(1)(B). Plaintiffs may be provided adequate monetary relief against the proper defendants under their § 1132(a)(1)(B) claim. This claim is merely a repackaging of Plaintiff's breach of fiduciary duty claim. Plaintiffs are not allowed to plead a violation of § 1132(a)(3) as an alternative to § 1132(a)(1)(B). *Lefler v. United HealthCare of Utah, Inc.*, 162 F. Supp. 2d 1310, 1324 (D. Utah 2001) ("In the wake of *Varity*, federal courts have concluded that, when a plaintiff can state a claim for relief under 29 U.S.C. § 1132(a)(1)(B), the plaintiff cannot maintain simultaneously a claim under 29 U.S.C. § 1132(a)(3)."). Therefore, relief under § 1132(a)(3) is not appropriate, and the Great-West Defendants' Motion to Dismiss Plaintiff's § 1132(a)(3) claim is granted.

4) Preemption of State Law Claims

Although the Great-West Defendants' argued preemption as a basis for dismissing Plaintiffs' state law claims, the parties agree that the claims are not preempted because Plaintiff's asserted causes of action are based on pre-Plan conduct. *See Woodworker's Supply Inc. v.*

Principal Mutual Life Ins. Co., 170 F.3d 985, 991-92 (10th Cir. 1999).

5) Negligence Claim

The Great-West Defendants argue that they owed no duty to Plaintiffs with respect to any of their activities in setting up the Plan. "One essential element of a negligence action is a duty of reasonable care owed to the plaintiff by defendant. Absent a showing of duty, [the plaintiff] cannot recover." *AMS Salt Indus. v. Magnesium Corp. of Am.*, 942 P.2d 315, 319 (Utah 1997). Plaintiffs, however, argue that they were foreseeable plaintiffs who would have been damaged by any negligence in the process of setting up the Plan. The court agrees with the Great-West Defendants that whether such a duty exists is a legal conclusion. However, the court believes that underlying facts as to the Great-West Defendants' relationship with the other defendants in establishing the Plan could be relevant to a determination of duty. Therefore, at the motion to dismiss stage, the court believes that Plaintiffs should be entitled to pursue discovery on the pre-Plan relationship and conduct of the parties. Accordingly, the court denies the Great-West Defendants' motion to dismiss Plaintiffs' negligence claim.

6) Breach of Contract Claim

The Great-West Defendants argue that the Plaintiffs are not parties to any pre-Plan contract and, therefore, lack standing to sue on a breach of contract claim. "One of the most basic principles of contract law is that, as a general rule, only parties to the contract may enforce the rights and obligations created by the contract." *Wagner v. Clifton*, 62 P.3d 440 (Utah 2002). The Plaintiffs, however, do not claim to be a party to any contract. Rather, they claim to be intended third-party beneficiaries.

"For a third party to have enforceable rights under a contract, 'the intention of the

contracting parties to confer a separate and distinct benefit upon the third party must be clear.'" *SME Indus., Inc. v. Thompson*, 28 P.3d 669 (Utah 2001). "The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear." *Id.*; *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 536 (Utah 1993).

The Great-West Defendants contend that the Plaintiffs have no rights as third-party beneficiaries because nothing in writing indicated an intent to confer a separate and distinct benefit upon Plaintiffs. However, Plaintiffs argue that this is only a contention and they should be allowed discovery to determine whether that is actually the case.

The court agrees that Plaintiffs are entitled to discovery on this issue. There is no evidence that all of the relevant pre-plan contractual agreements are before the court. The only contracts before the court are contracts that were entered into on the same date as the Plan. At the motion to dismiss stage, the court cannot determine as a matter of law that Plaintiffs were not intended third-party beneficiaries of any pre-plan contracts or agreements between the Great-West Defendants and the other defendants. Therefore, the Great-West Defendants' motion to dismiss Plaintiff's breach of contract claim is denied.

Plaintiffs' Rule 56(f) Motion for Continuance

Plaintiffs assert that the Great West Defendants' Motion to Dismiss should be converted to a motion for summary judgment because of the extraneous materials attached. However, a party can attach exhibits to a motion to dismiss containing documents referenced in the Complaint but not attached by the Plaintiff without the motion being converted to a motion for summary judgment. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). The documents attached to the Great-West Defendants' motion are referenced

in Plaintiffs' Complaint. Therefore, the court concludes that the Great-West Defendants' motion to dismiss should not be converted to a motion for summary judgment. Accordingly, Plaintiffs' motion for continuance under Rule 56(f) is moot.

III. CONCLUSION

For the reasons stated above, the Great-West Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' 29 U.S.C. § 1132(a)(2) claim and 29 U.S.C. § 1132(a)(3) claim and DENIED as to Plaintiffs' 29 U.S.C. § 1132(a)(1)(B), negligence, and breach of contract claims.

DATED this 10th day of December, 2003.

DALE A. KIMBALL
United States District Judge

blk

United States District Court
for the
District of Utah
December 11, 2003

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00429

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Allan O. Walsh, Esq.
MCKAY BURTON & THURMAN
10 E SOUTH TEMPLE STE 600
SALT LAKE CITY, UT 84133
JFAX 9,5214252

Scott M. Petersen, Esq.
FABIAN & CLENDENIN
215 S STATE STE 1200
PO BOX 510210
SALT LAKE CITY, UT 84151
EMAIL

Mr. Brian S King, Esq.
336 S 300 E STE 200
SALT LAKE CITY, UT 84111
EMAIL